November 24, 2003

Honorable Victor V. Vierra
Chief of Police
Hawaii County Police Department
349 Kapiolani Street
Hilo, Hawaii 96720

Dear Chief Vierra:

Re: Police Department Mug Shots

This is to confirm the oral opinion provided to Major Cheryl Reis of the Hawaii County Police Department by the Office of Information Practices ("OIP") on June 27, 1994, concerning the public's right to inspect and copy booking photographs or "mug shots" of arrested individuals.

Major Reis contacted the OIP for advice in responding to requests that the Hawaii County Police Department received from several mainland and Hawaii media organizations for a copy of the mug shot of Mr. Samuel Reeves, who was recently convicted of a criminal offense in the County of Hawaii. Mr. Reeves is apparently the father of actor Keanu Reeves.

In our telephone conversation, the OIP informed Major Reis that mug shots maintained by the Hawaii County Police Department would not be protected from disclosure under any of the exceptions in section 92F-13, Hawaii Revised Statutes.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), mug shots or booking photographs maintained by the county police departments must be made available for inspection and copying upon request.

BRIEF ANSWER

Yes. Mug shots are government records for purposes of the UIPA. It is our opinion that only the UIPA's "clearly unwarranted invasion of personal privacy" exception would arguably permit the county police departments to withhold access to booking photographs or mug shots of individuals who have been arrested.

Based upon the principles set forth in OIP Opinion Letter No. 91-4 (Mar. 25, 1991), and in U.S. Supreme Court and state court decisions concerning mug shots and arrest records, it is our opinion that the disclosure of a mug shot would not constitute a clearly unwarranted invasion of personal privacy under the UIPA.

Accordingly, we find that the Hawaii County Police Department must make a copy of Mr. Samuel Reeves' mug shot available for public inspection and copying upon request.

DISCUSSION

The UIPA provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphases added). Mug shots kept by the Hawaii County Police Department are government records for purposes of the UIPA.

In the opinion of the OIP, only the UIPA's "clearly unwarranted invasion of personal privacy" exception, section 92F-13(1), Hawaii Revised Statutes, would arguably permit the Department to withhold a copy of Mr. Reeves' mug shot.

In OIP Opinion Letter No. 91-4 (Mar. 25, 1991), we concluded that the disclosure of chronologically compiled arrest or police blotters maintained by the county police departments would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. This conclusion was based upon state court decisions holding that an arrest is a public, not a private event and that secret arrests are a "concept odious to a democratic

society." OIP Op. Ltr. No. 91-4 at 9, quoting, Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

Further research we have conducted reveals that the disclosure of an arrested person's mug shot would not constitute a clearly unwarranted invasion of personal privacy. For example, in Paul v. Davis, 424 U.S. 693 (1976), the U.S. Supreme Court held that a police department's circulation to merchants of a mug shot of a person thought to be an active shoplifter would not implicate any constitutionally protected right to privacy:

> Davis claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private" but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive decisions hold this or anything like this, and we decline to enlarge them in this matter.

Davis, 424 U.S. at 713.

Similarly, in Detroit Free Press, Inc. v. Oakland County Sheriff, 418 N.W.2d 124 (Mich. Ct. App. 1987), the court held that booking photographs of suspects charged with felonies awaiting trial were not protected from disclosure under an exception to the Michigan Freedom of Information Act for records of a personal nature, the disclosure of which would be a clearly unwarranted invasion of privacy. Noting that comment (c) to § 652D of the Restatement (Second) of Torts (1977) states that publicity concerning arrests are matters of legitimate public concern, the court stated:

> We conclude that the disclosure sought by plaintiff in this case would violate neither common law nor constitutional principles of privacy and that, using the approach outlined in Justice Cavanagh's opinion in *State Employees Ass'n*, nondisclosure is not justified under [the Michigan Freedom of Information Act] . . . .

> . . . The initial inquiry in any approach under § 13(1)(a) is whether the information sought is "of a personal nature." We find that the information sought in this case is not of such nature. According to the plaintiff, Bullock and Mitchell had been arrested and charged with felonies and were awaiting trial at the time of plaintiff's request for release of the booking photographs. Any court proceedings had been open to the public. Based on the facts of this case, we are persuaded that the booking photographs of these two persons revealed no "information of a personal nature" within the meaning of § 13(1)(a).

Detroit Free Press, 418 N.W.2d at 130; see also, Patterson v. Allegan County Sheriff, 502 N.W.2d 368 (Mich. Ct. App. 1993); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1119 (Md. App. 1986) ("we cannot regard appellant's 'mug shot' as being a private fact; it is by law, a public record to which the public may have had access").

Likewise, in Texas Open Records Decision No. 616 (Aug. 13, 1993), the Texas Attorney General found that a mug shot of an individual who was convicted of an offense was not protected from disclosure under the Texas Open Records Act. The Texas Attorney General noted that the "mug shot" pertained to a closed law enforcement investigation, and that disclosure of the mug shot would not implicate common law or constitutional privacy concepts:

> [I]nformation may be withheld on common law privacy grounds only if it is highly intimate or embarrassing and it is of no legitimate concern to the public.
>
> We do not believe that the requested "mug shot," which was taken in connection with an individual's arrest for an offense for which he was subsequently convicted and is currently serving time, is intimate or embarrassing.

Texas Open Records Decision No. 616 at 3 (footnotes omitted).

Based upon the principles set forth in OIP Opinion Letter No. 91-4 and the above-cited authorities, it is the opinion of the OIP that disclosure of Mr. Reeves' mug shot would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

Additionally, because we do not believe that any of the other exceptions in section 92F-13, Hawaii Revised Statutes, would permit the Hawaii County Police Department to withhold access to this mug shot, we conclude that it must be made available for inspection and copying during regular business hours.

Please contact me at 586-1404 if you or your staff should have any questions regarding the advice set forth above.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: Jeffrey S. Portnoy, Esq.